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No. 80-756
IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, AND ADMINISTRATOR, HEALTH CARE FINANCING ADMINISTRATION,

Petitioners,

vs.

GRAY PANTHERS,

Respondent.

BRIEF FOR THE RESPONDENT

GILL DEFORD
NEAL S. DUDOVITZ
National Senior Citizens
Law Center
1636 West Eighth Street, #201
Los Angeles, California 90017
(213) 388-1381

TOBY S. EDELMAN
National Senior Citizens
Law Center
1424 - 16th Street, N.W. #300
Washington, D.C. 20036
(203) 232-6570

Attorneys for Respondent

QUESTION PRESENTED

Whether Medicaid regulations promulgated by the Department of Health and Human Services, which permit certain states to assume that a portion of an individual's income is available to the spouse in a nursing home, without regard to whether in fact that income is available, are inconsistent with the Medicaid statute, as the court of appeals so determined.

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No. 80-756

RICHARD S. SCHWEIKER, SECRETARY OF HEALTH AND HUMAN SERVICES, AND ADMINISTRATOR, HEALTH CARE FINANCING ADMINISTRATION,

PETITIONERS,

v.

GRAY PANTHERS,

RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The District of Columbia Circuit

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BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

1. Since its inception in 1965, the Medicaid statute, Title XIX of the Social Security Act, 42 U.S.C. §1396 et seq., has required states to use "reasonable standards ... for determining eligibility for and the amount of assistance", to take

"into account only such income and resources as are ... available to the applicant or recipient," and to "provide for reasonable evaluation of any such income and resources ...." 42 U.S.C. §1396a(a)(17)(B), (C). It also forbids states from "tak[ing] into account the financial responsibility of any individual for any applicant or recipient of assistance ... unless such applicant or recipient is such individual's spouse or such individual's child ...." 42 U.S.C. §1396a(a)(17)(D).

Pursuant to these directives, the Department of Health, Education and Welfare ("HEW") and its successor, the Department of Health and Human Services ("HHS"),[1/] have required from the outset that states only consider income and resources which are "actually available" or "in hand" or "under the control of" the applicant. Despite this requirement, however, the

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1/ Future references in this brief will generally be to "HHS". It should be assumed that that expression necessarily refers to "HEW" where chronologically applicable. See 20 U.S.C. §3508.

agency never undertook to enforce its apparent meaning, thus permitting states to deem, or assume, that income was available to an applicant spouse without regard to whether it was in fact available. This presumption of availability, or "deeming", was accepted without question, regardless of individual circumstances, including whether the applicant spouse was living in a nursing home and thereby involuntarily separated from the other spouse.

In 1972, Congress replaced the three federal-state cash assistance programs for the aged, blind and disabled with one federally administered and financed program, Supplemental Security Income ("SSI"). Title XVI of the Social Security Act, 42 U.S.C. §1381 et seq., as added by Pub.L. 92-603, §301, 86 Stat. 1465. At the same time, Congress altered the methodology for determining Medicaid eligibility for the so-called "categorically needy". See 42 C.F.R. §435.4 (1979). It provided an alternative method to determine the eligibility as categorically needy of the aged, blind and disabled.

This was the "209(b)" option, which permitted states to base eligibility for the aged, blind and disabled on the eligibility rules validly in effect on January 1, 1972. 42 U.S.C. §1396a(f), as added by Pub.L. 92-603, §209(b), 86 Stat. 1381 (1972). Thus, while most states became locked into the SSI rules for purposes of determining Medicaid eligibility for the aged, blind and disabled, the rest remained subject to the rules and regulations in place in 1972.

A significant aspect of the 209(b) option was its requirement that states employ a "spenddown" in determining eligibility. Applicants were permitted to establish eligibility by reducing gross income by the amount of incurred medical expenses. Prior to the passage of the 209(b) option, only those states which had elected to provide coverage to the "medically needy", see 42 U.S.C. §1396a (a)(10)(C); 42 C.F.R. §435.4 (1979), utilized a spenddown -- and then only for the medically needy. In short, while selection of the 209(b) option permitted a state to use lower eligibility levels

than were employed in the SSI program, it also mandated use of the liberal spend-down mechanism for determining categorically needy eligibility.

Despite passage of the SSI program and the 209(b) option in 1972, and implementation on January 1, 1974, HHS did not alter the regulations applicable to the determination of "available" income and resources until April 13, 1977. See 42 Fed.Reg. 2684 (Jan. 13, 1977). Until that date, all states were presumptively subject to the regulations which had been in effect, in generally the same form, since 1966. As previously noted, those regulations required states only to consider "actually available" income, and did not distinguish between states based on their 209(b) or "SSI" status. When the change was finally made, however, HEW devoted its explanation entirely to the new requirement that the SSI states utilize the SSI rules. The "new" regulations for the 209(b) states simply restated the message of the option, 42 U.S.C. §1396a(f), by declaring that "consideration of income and resources may not be more restrictive

than that included in the State's January 1972 title XIX plan." 45 C.F.R. §248.3 (b)(4)(1977). Thus, by necessary inclusion, the 209(b) states were still subject to the deeming rules in effect in 1972.

Consequently, at all times since the implementation of Title XIX, regulations have been in effect which, explicitly or implicitly, required the 209(b) states to consider only income "actually available" to the applicant.[2/] Despite this prohibition, though, HHS did not stop states from deeming. Because that failure contradicts the language of the statute, and

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2/ Similar language has also applied to Puerto Rico, Guam, and the Virgin Islands. The SSI program did not apply to those jurisdictions, see Pub.L. No. 92-603, §303(b), 86 Stat. 1484 (1972); Califano v. Gautier Torres, 435 U.S. 1, 2 (1978), leaving them subject to requirements which had always been in effect. As plaintiff contends that the Medicaid statute, through 42 U.S.C. §1396a(a)(17), prohibits those states not tied to SSI eligibility to deem income available which is not in fact available, infra, at 24-79, these three island jurisdictions must be subject to the same rules as are the 209(b) states.

the explicit intent of Congress as expressed in the legislative history, plaintiff challenged the HHS action.

2. The Gray Panthers filed its complaint challenging the deeming rules on April 13, 1978 (J.A.9a). The district court found the statutory argument dispositive, and did not reach plaintiff's constitutional contentions. 461 F.Supp., at 321 n.3 (Pet.App. 27a n.3).[3/] The court acknowledged the statutory directive that the Secretary must prescribe the standards for determining what income and resources are "available", 42 U.S.C. §1396a(a)(17)(B), but held that that obligation did

> "not allow the Secretary to determine in a wholesale fashion what should be available to the applicant. ... [T]he phrase 'determined in accordance with standards prescribed by the Secretary' in clause (B) was not intended to remove the

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3/ Prior to the decision, the challenged regulations were rewritten and recodified, but with no "substantive" or "policy" changes. 43 Fed.Reg. 45176 (1978). The parties stipulated that the alteration represented no change in the effect of the regulations (J.A. 28a).

> requirement that only 'actually available' income and resources would be considered." 461 F.Supp., at 322 (Pet.App. 28a) (emphasis supplied; footnote omitted).

Furthermore, the court rejected defendants' contention that clause (17)(D), which allows states only to utilize financial responsibility laws directed at spouses and parents, led to a different result. "While [(D)] may allow a state to enforce its financial responsibility laws against a spouse or parent, this subpart does not suggest that the amount of contribution from that person should be a deemed amount." Id., at 322 n.5 (id., at 28a n.5) (emphasis in original). The court concluded that "the deeming procedure violates the Medicaid statute, and, therefore, is invalid." Id., at 323 (id., at 30a).

The orders issued in accordance with the decision (Pet.App. 31a, 33a) required defendants to rescind the offending regulations, "to require all relevant jurisdictions to cease deeming of income for any length of time between institutionalized Medicaid recipients or applicants

and their spouses," and to "promptly" implement new regulations.

In May, 1979, after defendants' motions for a stay to the district court and to the court of appeals had been denied, defendants issued orders to the affected jurisdictions to cease deeming. See CCH Medicare & Medicaid Guide, ¶14, 311, at p. 6195-3; 45 Fed.Reg. 82254 (1980); 44 Fed.Reg. 66855 (1979). Clarification of these orders was sent out by the Health Care Financing Administration on August 7, 1979. (J.A. 30a). Defendants published proposed regulations on November 21, 1979, nearly a year after the district court decision. 44 Fed.Reg. 66855. These proposed regulations complied with the statute by requiring states to "consider only the income in fact contributed by the spouse to the individual." 42 C.F.R. §§435.734(b), 436.711(b), 436.821(b), proposed at 44 Fed.Reg. 66856. Although these proposed regulations were apparently put in final form, see 45 Fed.Reg. 82255 (1980), they were never promulgated.

On July 29, 1980, the court of appeals affirmed. In the opinion, Judge Wright,

joined by Judge Markey (sitting by designation), analyzed defendants' arguments that the SSI statute required deeming in the 209(b) states. Recognizing that that requirement in the SSI statute was for reasons unrelated to the purpose of Medicaid deeming, 629 F.2d, at 184 (Pet.App. 7a-8a), the court held that it was probably appropriate to require limited Medicaid deeming in the SSI states,

> "[b]ut it does not reflect a decision by Congress that 'deeming' -- for six months or for any period of time -- is necessarily an appropriate practice in the 209(b) jurisdictions that are the subject of this case .... [T]here is no required federal statutory 'deeming' in the 209(b) jurisdictions ...." Id., at 184 (id., at 8a) (footnote omitted).

The court also rejected the Secretary's argument, offered below but not to this Court, that "enactment of the 209(b) option ... amounted to a specific congressional approval of [the 1972] criteria .... Congress was not expressing its view that 'deeming,' as then practiced in state Medicaid programs, was consistent with the requirements of the

Medicaid statute." Id., at 184-185 (id., at 9a).

The court evaluated the legislative history behind the "availability" requirement and noted two significant policy factors which militate against deeming when spouses are separated by institutionalization. First, separation destroys the single economic unit, so that "'deeming' no longer accurately reflects the economic norm." Id., at 185 (id., at 11a). Secondly, the court pointed to the statute's goal of "ensur[ing] that governmental regulation does not needlessly disrupt people's lives." Id., at 186 (id., at 11a). Deeming between spouses separated by institutionalization has exactly that result: "In contrast with the ordinary situation of cohabiting spouses, institutionalized individuals and their husbands or wives are particularly vulnerable to the disruptive forces that can be exerted by governmental regulations." Id., at 186 (id., at 11a).

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The court of appeals did recognize that it was the "primary responsibility" of the Secretary to determine the propriety of deeming in given situation. But that "determination ... must proceed within the framework established by the Medicaid statute." Id., at 186 (id., at 12a). The Secretary was therefore ordered to prepare new regulations which "consider those policy concerns ...."

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Id., at 186 (id., at 12a).

Dissenting in part, Judge MacKinnon viewed the majority decision as failing to provide "meaningful guidance for the Secretary to reevaluate her regulations." Id., at 188 (id., at 16a). He found the challenged regulations not to be arbitrary or capricious, and therefore would have upheld them. Id., at 189 (id., at 17a).

The case was remanded to the Secretary, with explicit instruction from the court of appeals that she promulgate new regulations "without delay". Id., at 187 (id., at 13a). Upon motion of plaintiff, the district court established a schedule for publication of those regulations (J.A. 33a). They were published in proposed form on October 30, 1980 (45 Fed. Reg. 71821), and in final form on December 15, 1980 (45 Fed.Reg. 82254), effective that date.

The new regulations do not entirely prohibit deeming. Rather, they establish the rules used in the SSI states as the most restrictive which a state

may use.[4/] The states are also permitted, however, to use more liberal deeming rules, and may decide not to deem at all. 42 C.F.R. §§435.734(b), 436.711(b), 436.821(b), as published at 45 Fed.Reg. 82259 (1980). Moreover, in the analysis preceding the new regulations, the Secretary has set out the significant considerations which argue against deeming; the Secretary's overriding concern is "to adopt policies that are in the best interest of program beneficiaries." 45 Fed.Reg. 82256 (1980).

Thus, two years after the district court made its initial ruling in this case, defendants finally promulgated and published regulations which substantially

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4/ Those rules require pooling of income for eligibility purposes for one month and six months after the spouse enters the institution, the length of the period depending on whether the non-institutionalized spouse is an eligible spouse. See 42 C.F.R. §435.723(c), (d) (Pet.App. 37a).

limit the challenged deeming policy.[5/] Since at least May, 1979, however, when defendants notified the affected jurisdictions of the district court decision, income deeming has not been permitted in the 209(b) and island jurisdictions. The decision in this case will therefore determine whether those jurisdictions, and others which may later opt for 209(b) status, will be permitted to return to a policy of deeming for indefinite periods and in unlimited amounts.

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5/ In the meantime, the federal court in Utah also held the HHS deeming regulations invalid. Allen v. Califano, No. 78-0212 (D.Utah, Aug. 23, 1979), appeal pending No. 79-2167 (10th Cir.). Both that court and the Tenth Circuit denied defendants' motions for a stay of the order, but Mr. Justice White recently granted that request. Schweiker v. Allen, No. A-783 (March 19, 1981). The Tenth Circuit has now lifted its stay of further appellate proceedings. (March 27, 1981)

SUMMARY OF ARGUMENT

I. Despite the recognized complexity of the Medicaid statute, the issue here -- the propriety of income "deeming" -- presents a comprehensible question. That question is whether the statute permits states to conclusively presume that income is available from an individual to his or her spouse in a nursing home without regard to whether it is in fact available.

Defendants contend that the case should be reviewed under the standard set out in Batterton v. Francis, 432 U.S. 416 (1977). Even if that is the appropriate standard, however, the challenged procedure is still impermissible, as it directly contradicts congressional intent and the purpose of the statute.

A. The "209(b) option", 42 U.S.C. §1396a(f), was established by Congress to permit those states which selected it to use different financial conditions for determining the Medicaid eligibility of the aged, blind and disabled than are required under the general rule tying

Medicaid eligibility to SSI eligibility. 42 U.S.C. §1396a(a)(10)(A). Specifically, so-called "209(b) states" are allowed to apply any of their Medicaid eligibility rules validly in effect on January 1, 1972. As the option did not free states from statutory requirements other than the tie-in to SSI eligibility, a state may only deem if that is consistent with 42 U.S.C. §1396a(a)(17), which has been in effect since Medicaid was introduced and which describes the financial conditions of eligibility.

B. Subsection (17) sets out one specific and three general requirements. Clauses (B) and (C) specify that only available income may be considered and that it must be reasonably evaluated. Clause (D) permits states to apply their financial responsibility laws to spouses, but does not, as defendants urge, allow a state merely to assume that that support is or will be provided.

C. Congress expressly stated in the legislative history that only "actually available" income could be counted, and that the statute was designed so that

states would not assume income available which was not "in fact" available. Congress thus sought to guarantee health care to the poor, regardless of the circumstances surrounding their indigency. A host of appellate and district courts have recognized this goal in invalidating state deeming practices.

Moreover, HHS itself, from the outset of the Medicaid program, has repeatedly stated that only "actually available" income should be considered. Although that language was eliminated from the 1977 revision of the regulations, it continued to be incorporated by reference. Statements in comparable contexts indicate that HHS recognizes the apparent meaning of "actual availability", despite its effort to disavow that meaning. And this Court has also forbidden states, in the AFDC program, from drawing conclusive presumptions of income availability; depriving, or threatening to deprive, the needy individual of assistance is not the appropriate means of enforcing the legal liability of another.

D. Clause (D) is not to the contrary. Its primary purpose is to prohibit states from applying relative responsibility laws to most relatives, but it exempts spouses from this prohibition. Still, by permitting states to employ spousal responsibility laws, Congress did not intend that they violate the requirement of actual availability in clause (B). (D) was intended as a limitation on familial responsibility, not an extension.

The lower courts have generally recognized that relative responsibility is not properly effected by a mere presumption of support, and HHS memoranda suggest the agency's recognition of the distinction between deeming and responsibility laws. Moreover, 42 U.S.C. §1396a(a)(25), and its implementing regulations, support the notion that, as a general rule, third-party liability is to be enforced through the state judicial process, not by reducing coverage on the assumption that support will be provided. The existence of a legal liability does not eliminate the requirement that only

actually available income be considered.

E. The policy considerations which motivated Congress, and which HHS has recently recognized, strongly support a prohibition against deeming. First, removal of one spouse to a nursing home destroys the single economic unit, which is the source for an assumption of support, and therefore for "deeming", between spouses living together. Secondly, deeming forces the non-institutionalized spouse to live below subsistence levels without any meaningful opportunity to dispute the state's decision, in contrast to the procedures available if responsibility laws are properly applied. Moreover, deeming can result in the denial of eligibility for the institutionalized spouse, or in eviction if the non-institutionalized spouse is unable or unwilling to pay the deemed amount. State officials often suggest divorce as a "solution", but that is a direct and insupportable intrusion on people's lives caused by the regulations.

In general, deeming exacerbates

an already difficult emotional situation through its uncompromising pressure on the non-institutionalized spouse. If that individual attempts to maintain a decent standard of living, he or she risks eviction of the other spouse. There is no opportunity to contest the state's presumption of availability. Congress specifically sought to prevent this unconscionable burden by its requirement of actual availability; it even cited, as an example of income which could not be counted, support payments from fathers which had not been in fact contributed. There is no indication that Congress meant to treat the legal liability of spouses any differently.

Congress established a procedure which fairly protects the interests of the applicant, the spouse, and the states. Deeming negates that carefully structured and balanced mechanism.

II. Defendants also assert that the SSI statute requires limited deeming in the 209(b) states. They contend that only SSI recipients are potentially

eligible for Medicaid in a 209(b) state, and that, therefore, 209(b) states must at least employ the SSI rules on income pooling.

Defendants' complicated analysis, however, ignores the language of the relevant provision. The 209(b) option explicitly releases states from the link to the SSI eligibility conditions. It requires opting states to use their valid January, 1972 rules, but nowhere states or implies that eligibility is available only to SSI recipients. The provision is flexible, and permits states to set their own financial eligibility conditions, subject only to the requirement that they not be more restrictive than those in effect in January, 1972.

That Congress intended the 209(b) option to be a flexible procedure is apparent from its insertion of a "spenddown" requirement for determining categorical eligibility. This is the most liberal of all Medicaid provisions, and is not required in the SSI states. Moreover, the spenddown requirement

demonstrates conclusively that Congress was not limiting eligibility in 209(b) states to SSI eligibles; many non-cash recipient individuals are categorically eligible in 209(b) states, as even defendants ultimately admit. And Congress recognized this necessary result by specifically defining all eligible Medicaid recipients in those 209(b) states without medically needy programs as categorically eligible.

Furthermore, the SSI provisions which defendants seek to impose in 209(b) states for determining Medicaid eligibility was not developed with the concepts of availability or deeming in mind. Rather, it was a fraud-control measure, designed to discourage spouses from voluntarily separating in order to obtain higher total SSI cash benefits. It bears no relationship to Medicaid or to deeming, and ignores the factors which militate against deeming for spouses involuntarily separated because one must enter a nursing home. Indeed, Congress has decided to treat a non-institutionalized spouse as an individual

for purposes of calculating the amount of the SSI entitlement, thus further recognizing the special nature of separations caused by institutionalization.

There is no legal basis for imposing the SSI income pooling requirements on spouses separated by institutionalization in 209(b) states.

A R G U M E N T

I. FEDERAL REGULATIONS PERMITTING STATES TO COUNT INCOME AS AVAILABLE TO AN INSTITUTIONALIZED SPOUSE, WHEN IT IS NOT IN FACT AVAILABLE, VIOLATE THE MEDICAID STATUTE

Judge Friendly has termed the Social Security Act and its regulations "almost unintelligible to the uninitiated." Friedman v. Berger, 547 F.2d 724, 727 n.7 (2d Cir. 1976), cert. denied 430 U.S. 984 (1977). Other judges have been equally uncharitable. One called the Medicaid statute "an aggravated assault on the English language, resistant to attempts to understand it." Friedman v. Berger, 409 F.Supp. 1225, 1225-1226 (S.D.N.Y.), aff'd 547 F.2d 724 (2d Cir. 1976), cert. denied 430 U.S. 984 (1977). Another

described the implementing regulations as "so drawn that they have created a Serbonian bog from which the agencies seemingly are unable to extricate themselves." Feld v. Berger, 424 F.Supp. 1356, 1357 (S.D.N.Y. 1976). HHS has itself admitted to the swamplike terrain of Medicaid in general and deeming in particular: "Medicaid eligibility criteria are the most technically complex of any Federal assistance program; regulations addressing it, unfortunately, are necessarily complex." 42 Fed.Reg. 2685 (1977).

A cursory reading of defendants' opening brief to this Court may suggest that the above complaints are understatements. Indeed, the government seems to suggest by implication that this area is so complex, so fraught with confusing mixtures between various parts of the Social Security Act, that the only rational recourse for a court is to defer to the agency. Who else, the government appears to ask, is in a position even to make a stab at the correct implementation

of the relevant provisions?

By any standard, the Medicaid statute is not susceptible to a simple or simplistic analysis. But, the government's approach to the particular issue of this case is considerably more complicated and convoluted than is necessary. Shorn of much that is irrelevant or only marginally related, this case presents a comprehensible question: whether Congress intended that, in counting the income of a Medicaid applicant, a state may merely assume that amounts derived by use of an arbitrary formula are available from the spouse of the institutionalized applicant regardless of whether in fact those amounts are made available. It is plaintiff's position that the statute, as supported by the legislative history, and by HHS' own previous interpretations, specifically forbids such assumptions, and that therefore regulations which allow income to be imputed from one individual to another, without proof of actual contribution, are inconsistent with the Medicaid statute.

In comments to its most recent regulations, HHS has defined deeming in these terms:

> "[I]n situations where one spouse is institutionalized, [deeming permits states] to consider a portion of the income of one spouse as available to the other spouse, whether or not the income is actually contributed. Thus, a State is able to reduce in advance its Medicaid payment to an institution for the care of the spouse." 45 Fed.Reg. 82254 (1980).

The district court below similarly defined it, noting as well the arbitrary nature of the process: "This imputing of income on the basis of an arbitrary formula, without regard to the amount actually available to the institutionalized spouse, is commonly referred to as 'deeming'." 461 F.Supp., at 321 (Pet.App. 25a). Both the majority and the dissent in the court of appeals utilized similar definitions. 629 F.2d, at 183, 187 (Pet.App. 5a, 13a). The two basic premises of deeming, therefore, are that an amount unrelated to, and insufficient for, the actual needs of the non-institutionalized spouse is set aside for his or her use, with the

remainder deemed to the institutionalized spouse. That remainder is counted by the state as income of the institutionalized spouse for purposes of determining whether that individual is eligible for Medicaid, and, if so, the amount of benefits to be paid.[6/] Thus, deeming can lead either to a denial of eligibility, or to the institution receiving an insufficient amount to cover the cost of care, with eviction from the nursing home as the ultimate result.

In the SSI states, a form of this practice is permitted, but on a limited basis. When only one spouse is eligible, the pooling of their incomes must cease after the first month of institutionalization; when both are eligible, the income must be pooled for the first six months of institutionalization. 42 C.F.R.

6/ A Medicaid recipient receives no cash benefits. Instead, the provider (nursing home, doctor, pharmacist, etc.) bills the state agency. The agency then pays the difference between the cost of care and the amount of income for which the recipient is responsible.

§435.723(c), (d) (1979); see 629 F.2d, at 183 (Pet.App. 5a). HHS derives this rule from the relationship between the Medicaid and SSI statutes, as income pooling for couples is built into SSI eligibility determinations. See 42 C.F.R. §435.120; 42 Fed.Reg. 2685 (1977); see also Herweg v. Ray, 619 F.2d 1265, 1285-1287 (8th Cir. 1980) (McMillian, J.), pet. for cert. pending No. 80-60 (filed July 14, 1980). As there is no similar linkage between the 209(b) states and the SSI statute, however, those rules are not relevant to this case. See infra, at 79-96.

Defendants offer two distinct arguments to support their contention that deeming is required under the Medicaid statute in the jurisdictions here at issue. First, they contend that 42 U.S.C. §1396a(a)(17) permits unlimited deeming, subject to the requirement that the standards be no more restrictive than those in effect on January 1, 1972. Pet. Br. 17-27. Secondly, defendants argue that without regard to the explicit requirements and limitations of the

Medicaid statute, the relationship between that statute and the SSI statute requires a 209(b) state, at a minimum, to utilize the SSI rules on income pooling. Id., at 27-49. Although defendants devote the bulk of their discussion to the latter argument, the former is the real issue of this case. The question for resolution is whether the appropriate section of the Medicaid statute permits states to deem indefinitely. The issue here is the propriety of deeming in states which have specifically selected not to be bound by SSI criteria.

Defendants contend that the appropriate standard for review of the challenged regulations is that set out in Batterton v. Francis, 432 U.S. 416 (1977). Since it is the Secretary to whom Congress has entrusted the task of establishing the standards applicable to determining what income is available, 42 U.S.C. §1396a(a)(17)(B), defendants conclude that the Batterton approach is appropriate. The court below applied that standard, 629 F.2d, at 183 (Pet.App.

6a-7a), but still found the Secretary's actions unpersuasive in light of the statute's requirements.

The Batterton standard, however, is not necessarily applicable to this case. Judge Ross, writing for half of the Eighth Circuit, evaluated the same language, and concluded that it did not entrust the Secretary with the legislative obligation described in Batterton. Herweg v. Ray, supra, 619 F.2d, at 1272 n.4 (Ross, J.).[7/]

Moreover, even assuming the applicability of Batterton to this case, it does not automatically validate the actions of the Secretary. The Secretary is still

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7/ "[I]n Batterton Congress had given HEW the specific task of defining one term, 'unemployment,' rather than the general delegation of establishing standards which are 'consistent with the objectives of this subchapter.' §1396a(a)(17)(A).... In view of the difference in statutory mandate, we do not believe the standard of review under Batterton applicable to this case." Herweg v. Ray, supra, 619 F.2d, at 1272 n.4 (emphasis in original); contra Herweg v. Ray, supra, 619 F.2d, at 1276-1277 (McMillian, J.).

forbidden to implement regulations which are inconsistent with the statute. This Court must determine "that the Secretary's approach ... is not contrary to the purpose of the statute." Batterton v. Francis, supra, 432 U.S., at 431. In that effort, as the court of appeals determined, the Secretary failed. While establishing broad rules for evaluating "available" income, the Secretary neglected one of the most crucial and recurring situations, one which represents a significant and decided exception to the general rule that spouses' incomes are equally available to each other. It is in this failure, in neglecting to recognize the different policy considerations which attach and which are specifically discussed in the statute's legislative history, that the Secretary has negated the intent of Congress. Even under the most demanding standard, the Secretary is still not free from the obligation to ensure that the regulations implement the intent of Congress. The agency must consider "the relevant factors". Citizens to Preserve Overton

Park, Inc. v. Volpe, 401 U.S. 402, 414 (1971).

The Secretary is required to determine when deeming is permitted and when not permitted. The challenged regulations did not make that distinction. The Secretary's introduction to the new regulations demonstrates the significance of the factors relevant to this issue, see 45 Fed.Reg. 82254 (1980); the Secretary had previously ignored those factors, choosing instead to treat all couples the same, regardless of whether they were still living together and with no apparent recognition of the explicit purposes of the statute as set out in the legislative history. "[I]n order to be valid, [regulations] must be consistent with the statute under which they are promulgated." U.S. v. Larionoff, 431 U.S. 864, 873 (1977). That requirement is the key to an understanding of the Secretary's failing in this instance, for the challenged regulations are inconsistent with the statute.

> "The power of an administrative officer ... to prescribe rules

> and regulations ... is ... the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134 (1936) (citations omitted).

Regulations permitting states to count as available income which, in fact, is not available, directly contradict the purpose of the statute and the intent of Congress.

A. The 209(b) option (42 U.S.C. §1396a(f)

The 209(b) option, section 1902(f) of the Social Security Act, 42 U.S.C. §1396 a(f) (Pet.App. 36a), is framed in the negative. It permits a state which does not meet the requirements for providing Medicaid pursuant to the SSI rules to provide Medicaid pursuant to another set of rules. The release from the SSI rules is established with these words: "... no State not eligible to participate in the State plan program established under

subchapter XVI of this chapter [SSI] ...." The tie-in, or linkage, to the SSI program is established by 42 U.S.C. §1396a (a)(10)(A), which requires all states to provide Medicaid to all SSI recipients. See 629 F.2d, at 182 (Pet.App. 3a). Thus, if a state does not comply with section 1396a(a)(10)(A), and is therefore "not eligible to participate in the State plan program established under subchapter XVI of this chapter," 42 U.S.C. §1396a(f), it need not generally provide Medicaid to the aged, blind and disabled.

Of course, there is a significant proviso. The state must cover as eligible any aged, blind or disabled individual if it "would be (or would have been) required to provide medical assistance to such individual for such month had its plan for medical assistance approved under this subchapter [XIX] and in effect on January 1, 1972, been in effect in such month ...."

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42 U.S.C. §1396a(f).[8/]

The basic premise, therefore, of the 209(b) provision is that the SSI criteria are not applicable; instead, the Medicaid rules in effect in 1972 control. A state is therefore only required to provide Medicaid to those individuals who would have been eligible in 1972 -- subject to the deductions from gross income. Furthermore, the 1972 rules must themselves have been valid, for the 209(b) option was not intended to forever legitimize all rules which a state may have employed in 1972. See 629 F.2d, at 185 (Pet.App. 9a); Norman v. St. Clair, 610 F.2d 1228, 1235 (5th Cir. 1980), pet. for cert. pending sub nom. Schweiker v. Norman, No. 80-498 (filed Sept. 27, 1980); Winter v. Trainor, CCH Medicare & Medicaid Guide ¶28,151 at p. 10,599 (N.D.Ill. 1977). Rather, it was intended to permit states to utilize 1972 rules and standards

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8/ The remainder of the provision requires the exclusion of certain income and the "spenddown" for incurred medical expenses, and defines the categorically and medically needy in 209(b) states. See infra, at 79-96.

appropriately implemented under the Medicaid statute.[9/] Consequently, if deeming was invalid in 1972, it has not been rendered legal by the 209(b) option. Norman v. St. Clair, supra, 610 F.2d, at 1235.

Section 1396a(f) thus necessarily incorporates section 1396a(a)(17), which provides the financial eligibility standards for Medicaid. The 209(b) option does free a state from compliance with the SSI statute, but the state remains subject to the Medicaid rules, including those established by subparagraph (17). Defendants apparently accept this

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9/ Apparently retreating from their position below, see 629 F.2d, at 184 (Pet.App. 9a), defendants no longer disagree with this analysis: "If the eligibility criteria of a 209(b) state's 1972 Medicaid plan are valid ...." Pet. Br. 13 (emphasis supplied); see also id., at 47.

analysis,[10] and their discussion of §1396a(a)(17) indicates an understanding that that subsection -- not (10)(A) or the SSI statute -- must determine whether deeming is permitted. In short, whatever else is accomplished with section 1396a(f), it does not free a state from compliance with subsection (17). See, e.g., Hanke v. Nyhus, 470 F.Supp. 742, 745 (D. Minn. 1979). Resolution of this case therefore depends on an analysis of subsection (17).

B. Overview of 42 U.S.C. §1396a(a)(17)

Subsection (17) requires a state plan to

"include reasonable standards ...

10/ "[T]he purpose and effect of the 209(b) option is solely to provide a partial exemption from the requirements of 42 U.S.C. §1396a(a)(10)(A). A state that exercises the option cannot be required to cover SSI benefit recipients, unless those individuals would have been eligible for Medicaid benefits under the state's 1972 Medicaid plan. All of the other requirements of the Medicaid statute are fully operative." Pet.Br. 43 (emphasis supplied); see also id., at 11.

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> for determining eligibility and the extent of medical assistance which (A) are consistent with the objectives of [title XIX], (B) provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant or recipient ... in determining his eligibility for such aid, assistance or benefits, (C) provide for reasonable evaluation of any such income or resources, and (D) do not take into account the financial responsibility of any individual for any applicant or recipient of assistance under the plan unless such applicant or recipient is such individual's spouse ...."

The statute thus makes four demands of the states. First, they must not violate the overriding purpose of Medicaid, which is to provide health care to the indigent. 42 U.S.C. §1396(1); see O'Bannon v. Town Court Nursing Center, -- U.S. --, -- n.2, 100 S.Ct. 2467, 2470 n.2 (1980). Secondly, they must count only available income and resources. Thirdly, the evaluation of income and resources must be reasonable. And, finally, regardless of which relatives are subject to financial responsibility laws in a given state, the state

may only apply those applicable to spouses.

Defendants interpret this provision with two general approaches. First, they contend that "available ... could not have been intended to exclude consideration of all income not in the applicant's hands." Pet.Br. 20. Secondly, they assert that clause (D) "obviously contemplates that the income of an applicant's spouse may be considered 'available' in determining the applicant's eligibility for medical assistance ...." Id., at 18. This analysis, however, is directly at odds with the provision as a whole, with the legislative history, and even with defendants' own previous explicit guidelines and regulations. Had the word "available" appeared in a vacuum, defendants' interpretation might have been acceptable. But they ignore overwhelming authority in favor of a semantically impossible proposition: that "available" income can include income which is not available.

Subsection (17) must be read as a

continuum, with each part reflecting on the rest. (A) offers the general guideline: that Medicaid is designed to ensure the provision of medical assistance to those unable to pay for it. The remaining parts of (17) should be evaluated in light of that general premise. (B) requires states to evaluate an individual's financial position only in terms of the income and assets which that individual has. Tempering the temptation to read "available" so broadly that it would lose its meaning is clause (C), which demands a "reasonable" evaluation of income and resource. Whatever flexibility derives from "available" must be countered by a determination that that flexibility is not unreasonable. Finally, clause (D) does not operate as an exception to the rest of the subsection. Its major thrust is to forbid states from applying relative responsibility laws to relatives other than spouses. That states may take into account the financial responsibility of spouses, however, does not permit them to assume income available which is not available; it merely permits them to

apply those laws as usual.

C. Clauses (B) and (C): availability in fact

The availability requirement is discussed in detail in the legislative history. Both the Report of the Senate Finance Committee and that of the House Ways and Means Committee flesh out its meaning in unequivocal terms. The reports state an explicit purpose, one which is seemingly subject to only one interpretation:

> "Another provision is included that requires States to take into account only such income and resources as ... are actually available to the applicant or recipient .... Income and resources taken into account, furthermore, must be reasonably evaluated by the States. These provisions are designed so that the States will not assume the availability of income which may not, in fact, be available ...." S.Rep.No. 404, 89th Cong., 1st Sess. (1965), reprinted at [1965] U.S. Code Cong. & Admin. News, 1943, 2018; H.Rep.No. 213, 89th Cong., 1st Sess., 67 (1965) (emphasis supplied).

Even if the words "actually available" could be interpreted to allow states to

consider some portion of a separated spouse's income which was not contributed to the other spouse's care, the last sentence leaves no doubt as to Congress' express intent: "available" income cannot include income which is not in fact available. When a spouse fails to make a contribution, that income is not in fact available. Defendants have never indicated how this language could conceivably permit a state to count income not available to the applicant as if it were.

Congressional leaders echoed these explicit directives. Senator Ribicoff stated: "The bill would also require that only income and resources actually available to an applicant be considered in determining need ...." 111 Cong.Rec. 15804 (1965). Rep. Mills, in summarizing the statute for the House, made a similar observation: "No income can be imputed to an individual unless actually available ...." 111 Cong.Rec. 7216 (1965). The reports of the two committees repeated this prohibition against imputing income "to an individual unless actually

available." S.Rep.No. 404, supra, at 2018; H.Rep.No. 213, supra, at 10.

The starting point for analysis, therefore, is that Congress did not intend that an indigent individual be denied Medicaid merely because a state attributed income which falsely negated that poverty. Defendants' interpretation not only repudiates the explicit statements in the legislative history, but necessarily places the burden for receipt of medical assistance on the cooperation of an individual over whom the institutionalized spouse has no control. (B) and (C) were directed at the state's evaluation of the applicant's sitation, not at the state's rights with respect to the applicant's spouse.[11/] The legislative history explicitly requires the Secretary to develop regulations which will guarantee Medicaid for those with insufficient income to pay for their care. If that income is not in fact available to the applicant -- for whatever reasons -- Congress forbade its

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11/ Clause (D) is the vehicle for that effort. See infra, at 60-70.

consideration.

Defendants' analysis of clauses (B) and (C) has been implicitly or explicitly rejected by a multitude of lower courts.[12/] All have recognized that it is unreasonable to interpret a provision requiring consideration of only actual contributions in a manner which specifically permits

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12/ Gray Panthers, 629 F.2d, at 185 (Pet.App. 10a), aff'g 461 F.Supp., at 322 (Pet.App. 28a-29a); Brown v. Stanton, 617 F.2d 1224, 1230 (7th Cir. 1980), pet. for cert. pending No. 79-1690 (filed April 25, 1980); Hanke v. Nyhus, supra, 470 F.Supp., at 746; Nursing Home Residents' Advisory Council, 470 F.Supp. 747, 751-752 (D. Minn. 1979); Krygier v. Buscaglia, CCH Medicare & Medicaid Guide, ¶29,761, at p. 10,460 (W.D.N.Y. 1979); Foard v. Gibson, CCH Medicare & Medicaid Guide ¶29,679, at p. 10,145 (W.D.N.C. 1979); Rubin v. Creasy, CCH Medicare & Medicaid Guide ¶29,678, at p. 10,143 (S.D.Ohio 1979); Allen v. Califano, supra, Slip Op., at 2; Manfredi v. Maher, 435 F.Supp. 1106, 1113 (D.Conn. 1977); Burns v. Vowell, 424 F. Supp. 1135, 1140-1141 (S.D.Tex. 1976); Franssen v. Juras, 406 F.Supp. 1375, 1378 (D.Ore. 1975); see also McLaughlin v. Wohlgemuth, 398 F.Supp. 269, 276 (E.D.Pa. 1975), vac't and rem'd on other grounds 535 F.2d 251 (3d Cir. 1976) (similar situation involving AFDC statute analyzed in same way).

states to include income (or resources) which are not actually available.

> "[I]t is unreasonable ... for a state to assess the income of two persons on the theory that they maintain a single household, when it is a recognized fact that one member of that couple is confined to a long-term medical care facility. Such an assumption flies in the fact of simple, economic reality ...." Manfredi v. Maher, supra, 435 F.Supp., at 1113-1114 (footnote omitted).

Ironically, HHS formerly interpreted the statute in exactly this manner -- at least in writing. Its original explanation of these sections does not differ significantly from that which it employed until 1977. The initial dictates to the states appeared in HEW's Handbook of Public Assistance Administration, Supplement D.[13/]

13/ The Handbook was replaced by regulations in 1970. See 35 Fed. Reg. 8780 (1970); 36 Fed.Reg. 3860 (1971). Defendants acknowledge that the Handbook imposed restrictions on the states in the same manner as do regulations. Pet.Br. 26-27 n.14; see Response to Int. 16(a) (R., Joint App. in Court of Appeals, 45); see also Rosado v. Wyman, 397 U.S. 397, 415 (1970); King v. Smith, 392 U.S. 309, 317 (1968).

Thus, shortly after the statute became effective, HHS required states to evaluate financial eligibility in the identical fashion which Congress expressed in the legislative history:

> "Income and resources are realistically evaluated and are not assumed to be available from sources from which payments are not in fact received .... Available income and resources are income and resources which are 'in hand' or under the control of the individual ...." Handbook, Supp. D, §D-4230(4); see also id., §§D-4220(A)(4), (B)(3).

Again, it is difficult to interpret that language to permit states to include income which is not included; that is, however, excatly what states were doing. HHS never questioned states' deeming policies until after the implementation of SSI in 1974, despite this seemingly explicit language in the agency's regulations forbidding such action. Response to Request for Admission 15(c) (R., Joint App. in Court of Appeals, 25, 30); Defendants' Agreement with Plaintiff's Findings of Fact Not in Dispute No. 3 /

(R., Joint App. in Court of Appeals, 34, 39).[14/]

The requirement of "actual availability" was first codified in 1969. Like the Handbook, the regulations required states to

> "Provide that only such income and resources as are actually available will be considered; that income and resources will be reasonably evaluated; and that such income and resources will be considered as will be 'in hand' with a period, preferably of not more than 3 months ...." 45 C.F.R. §248.21(a)(4)(1970), as added in 34 Fed.Reg. 1320, 1321 (1969).

14/ Defendants' statement that state deeming practices were undertaken "[w]ith the approval of the Secretary of Health, Education and Welfare", Pet.Br. 3, is somewhat questionable. While HEW never moved to stop states from deeming, that "approval" appears to violate its own explicit prohibition against deeming. Either HEW was acting inconsistently with respect to its own regulations, or its regulations were interpreted in a manner directly contrary to their apparent meaning. In either event, the agency's behavior indicates a schizophrenic approach.

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Changes in location and codification were made over the years,[15] but the requirement that only actually available income be considered remained explicitly in the regulations until April 13, 1977.

These requirements reflected an apparent recognition that deeming should not be permitted between spouses separated by institutionalization. While HHS was not forcing the states to comply, it at least appeared to comprehend that these rules flowed necessarily from the statute and its legislative history.

The "new" regulations were first proposed in late 1975, more than 3 years after SSI was passed and two years after it went into effect. Their avowed major purpose was to impose the requirements of

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15/ See 45 C.F.R. §§248.21(a)(2)(i), 248.21(a)(3)(iv) (1972), recodified at 36 Fed.Reg. 3860, 3871 (1971); 45 C.F.R. §§248.3(b)(1), 248.21(a)(2)(i), 248.3(c)(4), 248.21(a)(3)(iv) (1974) (different codification for Puerto Rico, Guam, and the Virgin Islands, as opposed to all others), recodified at 39 Fed.Reg. 9512, 9516-9518 (1974).

the SSI statute on the "SSI states". See 40 Fed.Reg. 60074 (1975). At the same time, the proposed regulations purported to "clarify" the "actually available" language: "The reference to 'actually available' income and resources has inhibited proper imposition of relative responsibility provisions in eligibility determinations, in that support, while available, may not in fact be provided, thus creating an ambiguity as to whether it is 'actually' available." Ibid. Thus, while HHS admitted that the institutionalized spouse did not control the income, it rationalized the violation of explicit congressional intent and statement by allowing states to consider "support" which should have been provided (pursuant to relative responsibility laws) as if it were income which was in fact available. The "actually available" language was maintained, but the agency permitted 209(b) states to assume income available just as they always had. See proposed 45 C.F.R. §§248.3(b)(1), (4), at 40 Fed. Reg. 60074-60075 (1975).

When published in final form more than

a year later, however, this approach was scrapped. 42 Fed.Reg. 2684 (1977). Apparently deciding that further inclusion of the "actually available" language would only provide a basis for challenges to state deeming practices, the agency devised a detour around that language:

> "(A) State plan must:
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> (1) General. Provide that only such income and resources as are considered available under the provisions of this section may be considered ...." 45 C.F.R. §248.3(b)(1), as amended at 42 Fed.Reg. 2686 (1977).16/

It then set out the alternative approaches available depending on which option a state had chosen. Still managing not to use the expression "actually available", HHS offered this directive to the 209(b) states:

> "Provide that the available income and resources of spouses of aged, blind, or disabled applicants or recipients, ...

16/ It did not, however, alter the requirements "that income and resources will be reasonably evaluated" and that only income "in hand" be considered. 45 C.F.R. §§248.3(b)(1), 248.3(c)(4).

> must be considered as available in a manner identical to or more extensive than the manner in which such relatives' incomes and resources must be considered [in the SSI states]. However, such consideration of income and resources may not be more restrictive than that included in the State's January 1972 title XIX plan." 45 C.F.R. §248.3(b)(4), as added at 42 Fed.Reg. 2687 (1977).17/

HHS thus fell back on the language of the 209(b) provision, which necessarily required states to comply with federal law in effect in 1972. Of course, in 1972, the "actually available" language was a prominent part of the regulations, so that whatever the states may have actually been doing in 1972, they were subject to a requirement that prohibited them from considering any but "actually available" income. While the agency thus neatly disposed of language which was

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17/ A similar approach was utilized for Puerto Rico, Guam, and the Virgin Islands. See 42 Fed.Reg. 2687, 2688 (1977).

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effective in repudiating deeming,[18] it could not avoid the necessary implications of the 209(b) provision, nor the Medicaid statute and its legislative history.

Thus, since 1977 there has been no explicit regulatory requirement of "actual availability".[19] That does not, however, alter the obligation of HHS to enforce the statutory requirements. The statute precludes assumptions of income. That prohibition was specifically effected through regulatory requirements. And HHS cannot explain how its previous regulatory language could conceivably have permitted deeming. Indeed, it has indicated that those regulations' apparent meaning is the correct one.

18/ See, e.g., Franssen v. Juras, supra, 406 F.Supp., at 1378.

19/ The regulations were later renumbered, but with no change in wording. They became 42 C.F.R. §§448.3(b)(1), (4) (1977). 42 Fed.Reg. 52827 (1977). It was these regulations which were specifically challenged. As previously noted, supra, at 7, these were later altered in both wording and codification, but with no change in meaning.

In the AFDC program, for instance, the question of eligibility and amount of assistance must be determined with regard to support from the absent parent. HHS has promulgated a regulation which guarantees that recipients will not be punished for the failure of responsible individuals to make support payments. In so doing, the agency indicates conclusively that "actually available" does not include income which should be available: states cannot merely assume that support will be provided. The regulation states: "Whether or not the [child] support payments are received regularly, the agency does not delay or reduce public assistance payments on the basis of assumed support which is not actually available." 45 C.F.R. §233.20(a)(3)(v)(1978). Presumably, the import of this section is that "assumed support" can only be counted when it is in fact contributed. If HHS regulations are consistent, "actually available" must mean the same for children as for spouses.

Moreover, in comments to the regulations which were published pursuant to

the decision below, HHS described the treatment of support payments that are in fact made from one spouse to the other: "[T]his payment would always be considered in eligibility determinations since it is 'in-hand' (i.e., actually contributed)." 45 Fed.Reg. 82257 (1980) (emphasis supplied). HHS thus equates income which is in hand with that which is actually contributed. This seemingly obvious interpretation is significant, however, because HHS has repeatedly contended that states were not limited to counting only actually contributed income, but could also count income which was merely deemed available. This position was taken, of course, without regard for the fact that HHS' own regulations consistently required consideration of only "in-hand" income.[20/]

20/ That "available" means what it appears to mean is reflected in the congressional recognition that deeming is an exception to availability. Thus, in certain situations involving SSI, Congress explicitly negates the general rule of availability in favor of deeming. For

(cont. p. 56)

The HHS position on clauses (B) and (C) of subsection (17) has been to disavow its own regulations, which appear, both implicitly and explicitly, to have forbidden states from presuming the availability of income. In either its failure to act on its own regulations, or its effort to change the meaning of those regulations without explanation or rationale, HHS has acted without regard for the explicit dictates of Congress and the significant policy considerations behind those directives.[21/]

20/ (cont.)

instance, in determining the eligibility of an individual living with an ineligible spouse, Congress requires that "such individual's income and resources shall be deemed to include any income and resources of such spouse, whether or not available to such individual ...." 42 U.S.C. §1382c(f)(1)(emphasis supplied); see also id., §1382c(f)(2).

21/ Defendants claim that their deeming rules for the 209(b) states derive from "a careful analysis of the interlocking provisions of the Medicaid Act and [SSI] statute ...." Pet.Br. 11. Yet, when it eliminated the "actually available" language in the 1977 regulations

(cont. p. 57)

This Court, though, considered a similar issue in the AFDC context, and concluded that assumptions of support, without an actual contribution, are impermissible. In Lewis v. Martin, 397 U.S. 552 (1970) and Van Lare v. Hurley, 421 U.S. 338 (1975), the Court evaluated state practices which reduced AFDC benefits on the assumption that a lodger in the house or a man assuming the role of spouse ("MARS") was contributing to the recipient child's support. These policies were invalidated, for reasons substantially similar to those advanced by plaintiff.

In Van Lare, the Court recognized that this policy, while affecting the

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21/ (cont.)

which divided the SSI and 209(b) states, HHS did not analyze the significance of that change, or the policy factors militating against deeming. See 42 Fed.Reg. 2684-2685 (1977). While devoting considerable attention to the rationale for limiting deeming in the SSI states, HHS has ignored the impact of deeming and the significant legal arguments against it.

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intended beneficiaries, was directed at the lodger. This purpose was repudiated: "States may not seek to accomplish policies aimed at lodgers by depriving needy children of benefits." 421 U.S., at 348. Similarly, HHS and the states are here attempting to force a contribution from the non-institutionalized spouse by depriving the needy individual of benefits.[22/] In both situations, the individual for whom Congress designed the program is a pawn in the state's effort to force compliance by the non-beneficiary. This Court rejected the state procedure in Van Lare because of its assumption that the lodger contributed to the household "without any inquiry into whether in fact he does so." Id., at 346. The instant situation is no different.

22/ HHS recently acknowledged that deeming results in harm to the institutionalized spouse, whose behavior is not in question, while proper application of spousal support laws places the burden on the responsible party, the non-institutionalized spouse, whose refusal or inability to cooperate is the crux of the matter. 45 Fed.Reg. 82256 (1980).

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Lewis provides another relevant observation in a comparable context: "[T]he likelihood of the MARS contributing his own income to the children -- even if legally obligated to do so -- is sufficiently uncertain in the absence of marriage ties to prevent viewing him as a 'breadwinner' unless the bread is actually set on the table." 397 U.S., at 559. A similar analysis applies here. If the contribution has not in fact been made, then there is no basis to deprive the intended beneficiary of the assistance to which she is entitled. The need exists, regardless of why the contribution was not made. Children unsupported by a man-in-the-house are no less needy than those with no man there; similarly, an elderly, sick individual whose spouse does not make a demanded contribution is no less indigent because the state has determined that the contribution should be made. In both instances, the purpose of the statutes, to provide assistance to the impoverished, is subverted by bureaucratic assumptions which do not reflect reality.

Van Lare and Lewis are often distinguished from the issue of this case on two grounds. First, as the Fifth Circuit found dispositive, those cases involved individuals with no legal responsibility toward the applicants. Norman v. St. Clair, supra, 610 F.2d, at 1238-1239. Secondly, in the AFDC cases, the beneficiaries and adults were living together, necessarily sharing certain living expenses, such as shelter. By contrast, in this case, the spouses are separated. This factor, the dissolution of the "economy of scale", is a significant policy consideration, as even HHS ultimately recognized. See 45 Fed.Reg. 82256-82257 (1980). Before examining that issue, however, it is necessary to evaluate the significance of spousal responsibility in this context.

D. Clause (D): a limitation, not an extension

Defendants argue that (D) acts as an exception to the requirement of actual availability in (B). In effect, defendants contend that income which is subject to a support requirement --

regardless of whether any effort has been made to enforce that requirement -- is available to the applicant. This assumption that income potentially subject to a support order is available to the institutionalized spouse represents a legal fiction. It violates the express words and purpose of clause (B). Congress did not intend (D) to be an exception to (B), nor do the words of the provision support that interpretation. Spousal responsibility laws can be enforced, but they were never intended to be implemented by a bureaucratic methodology which bypasses state judicial processes.

As defendants note, one of Congress' concerns in replacing the limited Kerr-Mills medical assistance program was the disastrous effect that state responsibility laws were having on relatives of individuals requiring health care: the new statute "prohibits many of the sad practices such as relative responsibility tests which have plagued Kerr-Mills programs in the past." 111 Cong.Rec. 15813 (1965) (remarks of Sen. Hart). Thus, to relieve some of this burden, states were

specifically precluded from demanding contributions from relatives other than spouses and parents. At the same time, Congress noted that it was "proper to expect spouses to support each other .... Such requirements for support may reasonably include the payment by such relative, if able, for medical care." S.Rep.No. 404, supra, at 2018; H.Rep.No. 213, supra, at 68.

These concerns and explanations, however, nowhere indicate an intent that the appropriate method of enforcement was by deeming or assuming the availability of contributions. In one breath, Congress explicitly forbade states from making assumptions of availability. There is nothing to suggest that, in its next breath, Congress carved out a partial exception to that rule. The major thrust of clause (D) is not to impose obligations on families of beneficiaries, but to limit the obligations which would otherwise attach under state law. That provision adds nothing to the responsibility of spouses under state law; it merely notes that spouses remain subject to

whatever state laws are applicable. It does not expand the significance or meaning of those laws.[23/]

Nor does the legislative history suggest otherwise. Sen. Ribicoff, for instance, never indicated that states could, or were expected to, implement that provision by violating the express terms of clause (B). Instead, he merely noted that the "bill would also require ... that contributions may be required only from spouses ...." 111 Cong.Rec. 15804 (1965). Similarly, Sen.McNamara noted that the purpose was to avoid the use of relative responsibility laws "which often served to deter otherwise qualified individuals from seeking help.

23/ "[42 U.S.C. §1396a(a)(17)(D)] is intended to authorize a state mechanism for enforcing financial responsibility of relatives, not to permit presumptions forbidden elsewhere in the statute." Fransen v. Juras, supra, 406 F.Supp., at 1379; see also Brown v. Stanton, supra, 617 F. 2d, at 1230; Gray Panthers v. Secretary, supra, 461 F.Supp., at 322 n.5 (Pet.App. 28a n.5); Manfredi v. Maher, supra, 435 F.Supp., at 1109 n.5; McLaughlin v. Wohlgemuth, supra, 398 F.Supp., at 278.

The new bill would limit the application of the family responsibility provision to the spouse, if any, of the applicant." Id., at 15876. The goal, then, was to liberalize the existing system, not to impose requirements which would result in the applicant spouse losing eligibility. There is no indication in the legislative history that Congress ever contemplated that clause (D) would expand the impact and effect of relative responsibility laws.

HHS itself has recognized that relative responsibility laws do not encompass deeming. In a "Report to Secretary Mathews", dated September 20, 1976, Robert Fulton, Administrator of the Social and Rehabilitation Service (SRS) of then-HEW,[24/] evaluated (B) and (D):

> "[C]lause (D) of Section 1902(a)(17) does not, in our view, have anything to do with the consideration

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24/ SRS preceded the Health Care Financing Administration (HCFA); both had responsibility within HHS to develop policies implementing the Medicaid statute. 42 Fed.Reg. 33071 (1977).

('deeming' or 'assumption') of income. Clause (B) of that section deals with that topic. Clause (D), on the other hand, is a Federal limitation on the ability of states to enact relative responsibility laws. In other words, a State cannot, consistent with the Medicaid statute, enact a law requiring adult children to contribute to the medical costs of their parents ....

Financial responsibility laws do not, in themselves, deal with the question of the availability of income. Even if the law requires a contribution, the question still must be asked whether that contribution has actually been made or, if not, under what circumstances it should be assumed to have been made ('deeming' or 'assumption' of income)."

In an August 12, 1976 memorandum to the Secretary, an "Information Paper on Deeming and Relative Responsibility" was attached to explain the various issues in the area and to support the regulations proposed the previous December which were published in final form the following January. The paper (known by HHS as the "Morrill Memo") makes these observations:

"Relative responsibility provisions are embodied in State law and consist of general statutory requirements that specified relatives contribute to the support of other specified relatives. These laws are enforced through either criminal or civil proceedings. In the context of public assistance programs, State relative responsibility laws are invoked after the fact of eligibility determination. States (under applicable statutory authority) may seek retroactive recoveries through the courts when required contributions are not made.

Deeming permits government in specified instances to assume that the income and resources of certain individuals are available to an applicant for the purpose of determining financial eligibility for public assistance. Deeming is grounded in Federal statutes and is implemented by regulations which specify general standards for the reasonable evaluation and treatment of deemed income. There is no necessary relationship between deeming provisions and relative responsibility, although the former has its roots in the latter." Summary (of Morrill Memo), at 1 (emphasis supplied)(R., Ex. to Joint App.

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in Court of Appeals, 2).[25/]

These internal memoranda indicate that HHS recognizes the limited nature of relative responsibility laws. They do not, of themselves, permit states to assume availability; their sole method of enforcement is via state "criminal or civil proceedings." In published documents as well, HHS has recognized the appropriate use of these state laws. Responding to criticism from the SSI states regarding its proposal to limit deeming in those states, HHS noted that they were not precluded "from enforcing laws to retroactively recoup from responsible relatives medical assistance expenditures paid by the State on behalf of eligible recipients." 42 Fed.Reg. 2685 (1977) (response to Comment 1); see also id., at 2686 (response to comment 6). A similar sentiment was expressed in comments to the most recent regulations,

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25/ The Memo adds, however, that "[d]eeming ... may be considered a form of relative responsibility." Morrill Memo, at 2 (R., Ex. to Joint App. in Court of Appeals, 6).

where deeming and relative responsibility laws were referred to as different "methods". 45 Fed.Reg. 82256 (1980).

This recognition of the limited applicability of responsibility provisions gains further support from Congress' requirement that, where possible and reasonable, states should obtain contributions from legally liable third parties. 42 U.S.C. §1396a(a)(25). The regulations implementing that section indicate conclusively that a state is not to assume that liability of the third party will result in an actual payment. Thus, the state "may not withhold payment for services provided to a recipient if third party liability or the amount of liability cannot be determined, or payments will not be available, within a reasonable time." 42 C.F.R. §433.135(e)(2)(1979). The state may seek reimbursement from a third party either before or after Medicaid is provided. Id., at §433.135(f); see also the HHS Medical Assistance Manual, §§6-50-10 through 6-50-40, reprinted at CCH Medicare & Medicaid Guide, ¶14,749, at p. 6429. These requirements

are applicable to individuals as well as to organizations.[26/] HHS has consistently recognized that the responsibility of spouses for each other should be effected in the same manner as is that of other liable parties. Given the requirements of clause (B), it is as inappropriate to enforce the obligation of a spouse by deeming as it would be to enforce that of an insurance company.

Subsection (25) follows naturally from the necessary interpretation of clause (17)(D). The latter permits states to

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26/ Although the present regulations do not specifically identify individuals as potentially liable parties, the predecessor regulations did. See 42 C.F.R. §450.31(c)(1977). The changeover to the present regulations was effected with no "policy" or "substantive" alterations. 43 Fed.Reg. 45176 (1978). See also Medical Assistance Manual §6-50-21.A. The original implementation of subsection (25) was through SRS Interim Policy Statement No.2 (July 10, 1968), at 33 Fed.Reg. 10228-10229 (1968); it too cited individual liability as encompassed by subsection (25).

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enforce relative responsibility laws applicable to spouses. The former indicates that states should utilize those laws to collect payments from spouses who have failed to contribute. See Brown v. Stanton, supra, 617 F.2d, at 1231; Manfredi v. Maher, supra, 435 F.Supp., at 1114-1115. HHS' own observations regarding these provisions evidence no intent that clause (D) permits assumptions of availability otherwise forbidden. To the contrary, subsection (25) reinforces the apparent thrust of clause (D): that where legally liable spouses fail to make contributions which the state has determined should be made, it should enforce its spousal responsibility laws in the normal manner. 27/

27/ The Fifth Circuit concludes that if deeming is not permitted, clause (D) serves no function. Norman v. St. Clair, supra, 610 F.2d, at 1237. But that ignores its obvious purpose: to allow states to seek contributions from spouses through the standard channels, as subsection (25) underscores. The prohibition against deeming in (B) does not negate the significance of (D). See, e.g., Brown v. Stanton, supra, 617 F.2d, at 1230-1231;

(cont. p. 70)

E. Congress' anti-deeming posture follows from the relevant policy considerations

This statutory resolution by Congress was motivated by important policy considerations, as the court of appeals below noted and the Secretary now acknowledges. Primary among them is the economic effect of spousal separation, which destroys the spouses' previous ability to support each other.

> "[A]lthough there is a general expectation that spouses should support one another, their ability to do so is substantially undermined when one spouse is institutionalized. The expectation for support is based, in part, on the assumption that spouses maintain a common household, will share income and expenses, and therefore constitute a single economic unit. However, that assumption is undercut when a spouse is institutionalized." 45 Fed.Reg. 82256-82257

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27/ (cont.)

Hanke v. Nyhus, supra, 470 F.Supp., at 746; Manfredi v. Maher, supra, 435 F. Supp., at 1114-1115.

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(1980).[28]

The existence of a legal obligation does not mitigate the problem caused by separation; as one court succinctly observed: "Legal responsibility is not the real question in this type of case, but rather it is a question of the economic realities in a given situation." Burns v. Vowell, supra, 424 F.Supp., at 1142.

28/ Despite this unequivocal statement, defendants repudiate this analysis in their brief: "[T]he propriety of demanding that an applicant's spouse contribute to the costs of the applicant's medical care to the extent possible is not based on any notion of economies achieved by sharing a common household .... It is the marital relationship that is significant ...." Pet.Br. 20-21 (footnote omitted; emphasis supplied). Congress has explicitly recognized, however, the adverse impact of, and special considerations occasioned by, separation due to institutionalization; it treats those spouses as individuals, rather than as a couple, for purposes of computing the amount of SSI benefits. 42 U.S.C. §1382(e)(1)(B)(ii); see S.Rep.No. 94-1265, 94th Cong., 2d Sess., 27 (1976), reprinted at [1976] U.S. Code Cong. & Admin. News, 5997, 6021; see also Herweg v. Ray, supra, 619 F.2d, at 1287 (McMillian, J.).

The court of appeals specified the economic problems of deeming which emanate from separation: "Expenses can no longer be fairly characterized as jointly incurred, and 'deeming' no longer accurately reflects the economic norm." 629 F.2d, at 185 (Pet.App. 10a-11a).[29/] The Secretary has also recognized the harsh effect of deeming on the spouse at home:

> "[I]n [209(b)] States, the amounts that are protected for the non-institutionalized spouse's maintenance may be set at 1972 levels. These levels may be insufficient in light of the current cost of living. This may force the non-institutionalized spouse ... to try to live at levels that are inadequate for subsistence." 45 Fed. Reg. 82256 (1980); see, e.g., Manfredi v. Maher, supra, 435 F. Supp., at 1110; Franssen v. Juras, supra, 406 F.Supp., at 1377.

29/ See also, e.g., Foard v. Gibson, supra, CCH Medicare & Medicaid Guide, ¶29,679, at p. 10,144; Krygier v. Buscaglia, supra, CCH Medicare & Medicaid Guide ¶29,761, at p. 10,460 n.3; Franssen v. Juras, supra, 406 F.Supp., at 1377.
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By contrast, as the Secretary also acknowledges, pursuing support in the traditional manner does not have the same egregious and counter-productive effect:

> "[W]hen income is 'deemed', the spouse has less of an incentive actually to contribute the amount than if relative responsibility laws are used, because deeming has an adverse effect on the institutionalized individual, whereas relative responsibility laws affect the spouse in the community by requiring him or her to make support payments." 45 Fed.Reg. 82256 (1980).

The other side of the coin -- the effect of deeming on the institutionalized spouse -- is equally important. By including income of the non-applicant spouse, the state may determine that the applicant is not eligible. Moreover, even if she is eligible, the non-institutionalized spouse may fail to pay the deemed amount, so that the nursing home does not receive the full cost of care. The necessary result is eviction from the

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nursing home.[30/] The choice facing the non-institutionalized spouse is thus between a subsistence existence for him- or herself, and continued health care for the other. Franssen v. Juras, supra, 406 F.Supp., at 1377. It is a problem not easily resolved. And the "institutionalized individual is often literally helpless to temper the harshness of this dilemma." 629 F.2d, at 186 (Pet. App. 11a).

One "solution" is sometimes suggested: that the spouses divorce. See, e.g., Manfredi v. Maher, supra, 435 F.Supp., at 1110; Burns v. Vowell, supra, 424 F.Supp., at 1138. But this state infringement on marriage is unacceptable. 629 F.2d, at 186 n.14 (Pet.App. 11a n.14); Foard v. Gibson, supra, CCH Medicare & Medicaid Guide ¶29,679, at p. 10,145. Such a

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30/ See, e.g., 629 F.2d, at 186 (Pet. App. 11a); Brown v. Stanton, supra, 617 F.2d, at 1231; Rubin v. Creasy, supra, CCH Medicare & Medicaid Guide, ¶29,678, at p. 10,142; Manfredi v. Maher, supra, 435 F.Supp., at 1110; Franssen v. Juras, supra, 406 F.Supp., at 1377; 45 Fed.Reg. 82256 (3d column)(1980).

result, or even the suggestion of it, presents a classic instance in which "governmental regulation ... needlessly disrupt[s] people's lives." 629 F.2d, at 186 (Pet.App. 11a). Again, the Secretary recognizes this adverse impact from deeming, and notes that by limiting it, the likelihood of divorce will be reduced. 45 Fed.Reg. 82257 (1980).

The institutionalization of one spouse places a tremendous burden on couples, especially elderly ones who have been married for many years. The emotional trauma of illness and separation is exaggerated by the discovery that a retirement planned at a decent, if not luxurious, level will be thwarted by reduction of the non-institutionalized spouse's income to a subsistence level, with no opportunity to contest the deemed amount and -- if the state uses an arbitrary formula to calculate that amount -- no basis on which to contest it. The necessary fixed expenses of running a household are not diminished by the move of one spouse into an institution, yet the other spouse is suddenly expected to

survive -- to pay for rent, utilities, food, insurance, etc. -- on an income substantially reduced by deeming. That practice does not advance legitimate state goals; it masks real hardship and suffering under the guise of efficiency. "When ... one spouse needs special care and must live in a nursing home, it appears to us bureaucratically myopic to ignore the economic strain that institutionalization will cause to the spouse who remains at home." Franssen v. Juras, supra, 406 F.Supp., at 1378.

While Congress did not specifically discuss spousal deeming in the legislative history to the Medicaid statute, it did explicitly recognize the potential effect on individuals applying for assistance and their relatives. It carefully fashioned a mechanism which balances the interests and burdens of the states, the applicants, and their relatives. As a starting point, eligibility was not to be determined on the basis of income which is "in fact" not available. Indeed, the specific example cited by the congressional committees of potential

income not to be counted was "support orders from absent fathers, which have not been paid or contributions from relatives which are not in reality received by the needy individual." S.Rep. No. 404, supra, at 2018; H.Rep.No. 213, supra, at 67. It is inconceivable that Congress would recognize that an uncollected parental support payment, required by court order, was not available, while it permitted states to assume that a support payment, neither ordered nor made, was available from a spouse. "Available" cannot have diametrically opposed meanings depending on which relative is subject to a legal responsibility.

The applicant spouse is thus protected by the requirement that only actually available income be considered. Correspondingly, the other spouse is not to be subjected to conclusive presumptions that payments will be made, with the institutionalized spouse's welfare used as blackmail. The financial responsibility laws are the means to enforce spousal support requirements against the

responsible spouse. Clause (D) permits it, and subsection (25) corroborates that that is the appropriate route for the state to follow. It is the standard practice for requiring spouses to provide support, and the Medicaid statute does not suggest any divergence from it.

Congress established general guidelines to balance the interests of affected individuals and the states. The HHS policy allowing states to assume income available which is not in fact available repudiates the Congressional scheme and the underlying factors motivating that scheme -- factors which even HHS now recognizes. Deeming between spouses separated by institutionalization is inconsistent with the Medicaid statute, and should therefore be prohibited.

II. THE SSI STATUTE IMPOSES NO DEEMING REQUIREMENT UPON THE 209(b) STATES

Defendants analyze the Medicaid and SSI statutes at length to bolster their argument for required deeming in the 209(b) states. Pet.Br. 27-49. To a great extent, however, this discussion is

irrelevant to the issue of the case; more important, their ultimate conclusions are inaccurate, derived from a reading of the statute which is unsupportable.[31/]

Defendants' position is that, at a minimum, the 209(b) states must employ the SSI rules on pooling of income for determining Medicaid eligibility. Their general basis for this contention appears to be two dependent theories: that 209(b) status does not relieve opting states of the obligation to comply with SSI financial eligibility requirements and that Medicaid eligibility under the 209(b) option is potentially available only for individuals eligible for SSI. Under this reasoning, the pool of possible Medicaid recipients consists only of SSI eligibles, and from that pool, ultimate eligibility is established by application of the 209(b) rules. Thus, recipients in a

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31/ Since SSI does not exist in Guam, Puerto Rico, or the Virgin Islands, there is no way that this argument could possibly apply to those jurisdictions.

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209(b) state are necessarily a subset of all SSI eligibles. Consequently, defendants reason, at a minimum a state must apply the SSI rules.

The complexity of defendants' analysis is therefore occasioned by the need to explain how the numerous pieces of the SSI puzzle fit together. But this discussion ignores the very statute at issue: the 209(b) provision. Its language is explicit; it nowhere stands for or supports the analysis which defendants urge.

The distinctive and decisive feature of the 209(b) option is that it frees opting states from reliance on the SSI statute. With the advent of SSI in 1974, Congress tied Medicaid eligibility to SSI eligibility by requiring that all SSI recipients be automatically eligible for Medicaid. 42 U.S.C. §1396a(a)(10)(A). The 209(b) option untied this knot for those states which so chose. It defines a state selecting the option in terms which expressly indicate that that state is not required to follow the SSI rules: "no State not eligible to participate

in the State plan program established under subchapter XVI of this chapter [SSI] shall be required to provide medical assistance to any aged, blind or disabled individual ...." This opening section thus offers states the opportunity not to cover all SSI recipients by absolving them of compliance with subsection (10)(A). In plainer terms, this opening section says: "If you decide not to follow the SSI rules incorporated by reference through subsection (10)(A), you need not provide Medicaid to the aged, blind and disabled."[32/]

The second part of this first sentence of the 209(b) option[33/] then fills in the gap created by the first part of the sentence. Beginning with the word

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32/ The language of this portion of the 209(b) statute is essentially the negative form of nearly identical language establishing the general rule in subsection (10)(A).

33/ The first sentence is section 209(b) of Pub.L. 92-603, 86 Stat. 1381 (1972), with the second and third sentences added separately. Pub.L. 93-233, §13(a)(10)(D), 87 Stat. 962-963 (1973). All of 42 U.S.C. §1396a(f), however, is generally referred to as the 209(b) option.

"unless", the provision sets out the alternative method; it describes the option. That other side of the coin is coverage of all aged, blind and disabled in any month who would have been eligible for Medicaid in that month if the state were employing its January, 1972 rules.[34/]

A state thus has two distinct choices for coverage of the categorically needy: it can cover all SSI recipients, which is the standard procedure, or it can decide, via the 209(b) option, not to be linked with the SSI program and, instead, use financial eligibility conditions no more restrictive than those in effect on January 1, 1972.

Defendants reject this reading of the statute. While recognizing "that the intended operation and effect of the 209(b) option was ... to limit the obligations of participating states under 42 U.S.C. §1396a(a)(10)(A)," Pet.Br. 38, their

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34/ The remainder of the first sentence adds further provisos to this requirement, as will be discussed infra, at 88-90.

ultimate observation on 209(b) suggests a definite link with that subsection: "A state that exercised the option could only be required to provide medical assistance to those aged, blind or disabled individuals who were eligible for SSI benefits ...." Id., at 38 (emphasis supplied). Defendants devote the bulk of their analysis to explaining how, in light of other portions of the Medicaid and SSI statutes, this must have been Congress' intention.

Without this assumption, there is no basis for a requirement of minimum deeming in the 209(b) states; if the SSI standards are not superimposed upon a 209(b) state's 1972 eligibility conditions, then there can be no requirement that the SSI program's income pooling methodology be used. Defendants' assumption, however, has no support in the statute; its language implicitly and explicitly repudiates that analysis, and defendants' convoluted explanation as to what Congress must have intended only

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undercuts their argument.[35]

The 209(b) option nowhere states or implies that states must or can limit potential eligibility to the pool of SSI recipients. No language even distantly suggests such a restriction. As previously noted, the provision begins by exonerating opting states from the requirement that they comply with the SSI statute; it negates their tie-in with the SSI eligibility conditions through

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35/ Defendants state, for instance, that their conclusions are "virtually compelled by the language of the 209(b) option ...." Pet.Br. 41. Yet the option itself does not set maximum eligibility requirements, see infra, at 86, and defendants rely primarily on other components of the Medicaid and SSI structures.

subsection (10)(A).[36/] The very essence of the 209(b) option is its permission to the states to opt out of the otherwise required link to SSI.

The next part, which dictates the nature of the 209(b) states' obligation, is detailed and explicit. It does not, at any point, limit the application of those 1972 rules to individuals who are eligible for SSI. Congress did not impose that restriction, though it easily could have. The language of the relevant provision is therefore inconsistent with defendants' analysis.

Defendants support their contention by reference to the legislative history of 209(b), which indicates that its

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36/ In any event, (10)(A) requires that all SSI recipients be eligible for Medicaid, not that all Medicaid recipients be eligible for SSI. Even if 209(b) states were somehow still subject to (10)(A) -- which even defendants appear to reject (Pet.Br. 38) -- that subsection does not demand that they limit potential eligibles only to those who receive SSI.

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purpose was to allow states to save on Medicaid costs. Undoubtedly, that was a motivating factor behind Congress' approach, but it was not the sole consideration. While Congress sought to aid those states whose Medicaid roles would have greatly increased if required to follow the SSI rules, it did not limit the 209(b) option only to states with rules more restrictive than SSI. The option became a general vehicle for states to define their categorically needy in terms broader than the restricted SSI rules -- which set both the minimum and maximum standards available to a state. The 209(b) option may have been initiated solely to permit states to limit eligibility, but it evolved into a provision allowing states flexibility in establishing Medicaid eligibility. Minnesota, for instance, a state with generally liberal standards, selected the 209(b) option; its approach to income deeming, which is less restrictive than in the SSI states, reflects the inherent flexibility of the 209(b) option. See 629 F.2d, at 183 n.7 (Pet.App. 6a n.7).

The broad nature of the option is best reflected in the spenddown provision. The spenddown is the hallmark of the medically needy, who are those individuals with gross incomes over cash assistance levels but whose incurred medical expenses are deducted from their gross incomes to render them eligible. See 42 C.F.R. §§435.4, 435.301(a). This progressive feature of the statute permits those individuals whose medical costs render them indigent to obtain necessary health care even though they are not eligible for cash assistance. See, e.g., S.Rep.No. 404, supra, reprinted in [1965] U.S. Code Cong. & Admin. News, 1943, 2018.

When it created 209(b), Congress incorporated the spenddown component of the medically needy into the option. By so doing, Congress devised a more flexible and liberal provision than defendants are willing to admit. Inclusion of a spenddown for the categorically needy renders the option a considerable advancement over the unbending requirements of the SSI link. Congress allowed states to use their 1972 standards, but it required,

as the price for maintaining the status quo on eligibility levels, that the states include the most flexible component of the Medicaid statute. See S.Rep. 92-1230, 92d Cong., 2d Sess., 222 (1972).

The spenddown requirement not only undercuts defendants' general contention as to the restrictive nature of the 209(b) option; it also explicitly negates the suggestion that 209(b) is applicable only to SSI recipients. Regardless of what eligibility levels a state uses, the spenddown, by definition, will allow non-SSI eligibles to obtain Medicaid coverage. Even defendants recognize that fact: "[I]t is inconceivable that Congress intended to require states exercising that option to provide Medicaid coverage to any individual who is ineligible for SSI benefits, except as may result from the operation of the 209(b) spend-down clause." Pet.Br. 45-46 (emphasis supplied). This reluctant admission, though, defeats defendants' entire argument, for it acknowledges that there is no requirement of SSI eligibility as a pre-condition for application of the

209(b) option. Defendants offer no explanation as to how the option could be limited to SSI eligibles when the spenddown is not employed, yet still encompass everyone when the spenddown is used. There is no explanation: the option does not distinguish between SSI eligibles and others for purposes of determining Medicaid eligibility under its provisions. Its only requirement is that a state provide Medicaid to anyone who would have been eligible in 1972 (with or without the spenddown); there is no SSI overlay.[37/]

It is also evident that Congress never expected the 209(b) option to be tied to SSI rules or SSI eligibility to be a pre-condition for Medicaid eligibility under 209(b). The "amendment" to 209(b) demonstrates this. Congress added the last two sentences of 42 U.S.C.

37/ That states do extend Medicaid coverage to non-SSI recipients under the 209(b) option is apparent from cases discussing the option. See, e.g., Norman v. St. Clair, supra, 610 F.2d, at 1233-1234; Manfredi v. Maher, supra, 435 F.Supp., at 1109-1110.

§1396a(f) to the original 209(b) language for the express purpose of clarifying the status of individuals eligible under 209(b). See S.Rep.No. 92-553, 93d Cong., 1st Sess., 57 (1973). Recognizing that the option would necessarily result in rendering many people eligible for Medicaid who were not SSI recipients, thereby eliminating the standard basis for defining the categorically needy, Congress arbitrarily established definitions for the 209(b) states.

Thus, where a state does not have a medically needy program ("States which do not provide medical assistance to individuals pursuant to ... [42 U.S.C. §1396a(a)(10)(C)]"), everyone who is found eligible "shall be considered an individual eligible for medical assistance under ... [42 U.S.C. §1396a(a)(10)(A)]". Everone, in short, will be categorically needy and treated as if they were SSI recipients. By necessary implication, not all of them would actually be recipients; otherwise, there would be no need for the legal fiction. In this manner, Congress recognized that the 209(b)

option would result in the extension of categorically needy Medicaid coverage to many people who would not be eligible in the SSI states and who, by definition, were not SSI recipients.[38/]

Defendants' effort to superimpose the SSI "deeming" rules on the 209(b) states is further weakened by an analysis of those rules. HHS requires their application in the SSI states because of subsection (10)(A), see Fed.Reg. 2684-2685 (1977), but they were not developed for any of the policy reasons associated with deeming or because of HHS' evaluation of subsection (17).

Recognizing the "economy of scale" which exists when spouses live together, Congress reasonably required that the income and resources of an "eligible individual" and "eligible spouse" be pooled

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38/ Furthermore, in order to distinguish the categorically needy in 209(b) states with medically needy programs, the amendment to 42 U.S.C. §1396a (f) arbitrarily defined the categorically needy in those states as individuals receiving SSI or state supplementary benefits.

for determining SSI eligibility. 42 U.S.C. §1382(a)(2). Concerned that spouses might separate, however, in order to obtain individual benefits which, together, would be greater than a couple's benefit, Congress defined an "eligible spouse" to include a spouse who had been separated from the "eligible individual" for up to six months. 42 U.S.C. §1382c (b). Thus, if a couple sought to collect the higher benefits of individuals, they could only accomplish it by spending the first six months living separately on the income allocated for spouses living together -- the very antithesis of the economy of scale on which a couple's benefit is premised. The six-month rule was thus a tool aimed at discouraging voluntary and improperly motivated separations. H.Rep. No. 92-231, 92d Cong., 2d Sess. 150 (1971), reprinted in [1972] U.S. Code Cong. & Admin. News 4989, 5136; see Gray Panthers, 629 F.2d, at 184 (Pet. App. 8a); Herweg v. Ray, supra, 619 F.2d, at 1285-1286 (McMillian, J.); Mansfield v. Weinberger, 398 F.Supp. 965, 968-969 (D.D.C. 1975).

This provision is thus not related to the policies behind availability or deeming. For instance, where only one spouse is eligible, the pooling of income ceases after the first calendar month of institutionalization. 42 U.S.C. §1382c(f)(1); see 42 C.F.R. §435.723(d); Gray Panthers, 629 F.2d, at 184 n.9 (Pet.App. 8a n.9). "Availability" could not have a different meaning depending on whether one or both spouses were eligible. It seems undeniable, therefore, that the six-month rule has no connection with the concept of availability, either in the SSI program or in Medicaid. Still, defendants attempt to employ a rule developed specifically to discourage voluntary, fraudulent separations in a cash assistance program to determine Medicaid eligibility for spouses who involuntarily separate and who, in many instances, are not even eligible for cash assistance. The two situations are unrelated. See Schweiker v. Wilson, -- U.S. --, 101 S.Ct. 1074, 1085 (1981)(Powell, J., dissenting).

Indeed, Congress has itself recognized that separation caused by

institutionalization is of a different caliber than other separations. Although eligibility is determined by pooling income and assets, benefits for the non-institutionalized spouse are calculated as if he or she were applying as an individual. 42 U.S.C. §1382(e)(1)(B)(ii); see S.Rep.No. 94-1265, 94th Cong., 2d Sess., 27 (1976), reprinted in [1976] U.S. Code Cong. & Admin. News 5997, 6021; Herweg v. Ray, supra, 619 F.2d, at 1287 (McMillian, J.). In light of this provision, defendants' reliance on the six-month rule to determine Medicaid eligibility in 209(b) states is especially unconvincing.

The six-month rule bears no relationship to the issue of Medicaid deeming. Given its irrelevance to deeming, it is questionable whether that provision should even be applied in the SSI states. But there is certainly no basis for its applicability to the 209(b) states, which are not restricted by SSI eligibility criteria. See 629 F.2d, at 184 (Pet.App. 8a). The effort in SSI to prevent fraudulent separations has no bearing on the

issue of Medicaid deeming, and there is no statutory authority for its application in this context. The carefully drafted requirements for determining the availability of income in the Medicaid program should not be overridden by an irrelevant provision in a separate program which has no connection to determinations of Medicaid eligibility.

Financial eligibility determinations for Medicaid coverage in the 209(b) states are not governed by the SSI statute, according to the explicit terms of the 209(b) option. Consequently, there is no basis for requiring the 209(b) states to employ the SSI deeming rules.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

GILL DEFORD
NEAL S. DUDOVITZ
TOBY S. EDELMAN

Attorneys for Respondent

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